Landmark Chambers

Welcome to Landmark Chambers' 'Planning Law Update for Local Authorities: Technical Issues for Planning Authorities' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Andrew Byass (Chair)

Matthew Dale-Harris

Topic:
Thorny Issues in Planning Enforcement

Ben Fullbrook

Topic:
Recent Caselaw on Permitted Development Rights

Joel Semakula

Topic:
Legal issues in conditions and planning obligations

Landmark Chambers

Recent Caselaw on Permitted Development Rights

Ben Fullbrook

Prior Approval

Landmark Chambers

What can be considered at prior approval?

- Only those matters specified in the order and not the whether the development comes within the description of the relevant class?
  - *Keenan v Woking Borough Council* [2017] EWCA Civ 438???
  - *R. (Marshall) v East Dorset DC* [2018] EWHC 226 (Admin)
- LPA bound to consider and determine whether development otherwise fals within definitional scope of the particular class of PD right
  - *Westminster City Council v Secretary of State of Housing, Communities and Local Government Government* [2019] EWCA Civ 2250 (aka *New World Payphones*)
- Unclear whether *Marshall* still good law – see *RSBS Developments Ltd v SSHCLG* [2020] EWHC 3077 (Admin)

Prior Approval

Landmark Chambers

Time Limits

- Strict time limits apply to determination of prior approval applications
- Extensions of time may be agreed by the applicant and the authority in writing: Art.7(c) GPDO
  - Applies equally to time limits specified under Art.7(a) and (b)
  - *"in writing"* can include an oral agreement which can be evidenced in writing (e.g. by confirmatory email)
  - "*extension"* cannot be general in nature – it must be possible to identify the specific longer period
  - See *Gluck v SSHCLG* [2020] EWCA Civ 1756

Prior Approval

Landmark Chambers

Challenging grants of prior approval

- *R (Coventry Gliding Club) v Harborough DC* [2020] EWHC 3059 (Admin)
  - Grant of prior approval is a decision *"under the planning acts"* therefore 6 week time limit for bringing JR applies (CPR 54.5)
  - Strict time limits on determination of prior approval applications are not incompatible with 3rd party rights under ECHR
  - What happens where a grant of prior approval is quashed after the deadline for determining prior approval applications has expired? Does the development become unconditional?

Unlawful Development – Art.3(5)

***RSBS Developments Ltd v SSHCLG* [2020] EWHC 3077 (Admin)**

- Art.3(5) Article 3(5) of the GPDO provides that any planning permission granted under the Order will not apply if:

  (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;

  (b) in the case of permission granted in connection with an existing use, that use is unlawful.

- Art.3(5) will apply to unlawful development undertaken after prior approval but before implementation of the PD right
- Art.3(5)(a) can apply to PD rights for changes of use where change of use sought is in connection with a building

Curtilage

***R (Hampshire CC) v SSEFRA* [2020] EWHC 959 (Admin)**

- Series of helpful principles on curtilage set out in *Challenge Fencing v SSHCLG* [2019] EWHC 553 (Admin), §18
- Holgate J holds that where development control is concerned practitioners should take care to read *Challenge* as a whole and in particular to note that the correct question is not whether whether the land and building together comprised a unit, but rather whether whether the land was so intimately associated with a building that the land formed part and parcel of the building.

Landmark Chambers

Thorny Issues in Planning Enforcement

Matthew Dale-Harris

Overview: three areas which can cause problems

Landmark Chambers

1. Factual/legal issues when defining the breach

2. Dealing with alternative/fallback developments

3. Declining to determine applications under s.70C

1. Defining the breach / requirements

- EN Checklist
  - Fully describe the breach so that recipient knows what it is (*Miller Mead*)
  - Identify if s.171A(1)(a) or (b) applies
  - Give reasons which :
    - State immunity period
    - Explain harm and why contrary to policy
    - Make clear whether purpose of notice is to remedy breach or injury to amenity (which should generally at least include the first – see discussion under issue 2)
  - Specify requirements (NB need for precision)
  - Date taking effect and time for compliance
  - Additional information

Key issues

- Under-enforcement
  - S.173(11) deemed planning permission for works or activities which could have been specified but were not.
  - NB does not apply to other works or activities which do not form part of the breach of planning control: ***Fidler v FSS*** [2005] JPL 510

- Whether works form part of a MCU:
  - If works are integral to the MCU then notice can require removal even if (i) otherwise immune (***Murfitt***) or (ii) not development in itself ***(Somak Travel***) BUT it may not be possible if the works were undertaken prior to the MCU for a different lawful use (***Bowring***)
  - See ***Kestrel Hydro v SSCLG*** [2016] EWCA Civ 784

Example

Landmark Chambers

- Farmyard being used for a plant hire and haulage business for five years prior to notice.
- Hardstanding has been laid and a portacabin office sited.
- Owner contends that hardstanding was laid two years ago, but that portacabin was originally brought on site five years ago with the unrealised intention of using it for the farm business.

- NB Operational Development time limit = 4 years; Material Change of Use (non dwellinghouse) = 10 years.

Approach

- Portacabin cannot be enforced against as standalone OD
- Is it part and parcel/integral to the MCU?
- What about the hardstanding? Is it really part of the change?
- If hardstanding not required to be removed then will there be under-enforcement?

2. Dealing with alternative/fallback developments

Landmark Chambers

- Landowners and their agents will often seek to negotiate an alternative development – either as a way to agree a settlement or to bolster ground (a) appeal (via a classic fallback argument).

- One option for them is to apply for permission – see Issue 3.

- If not, how can alternative schemes be considered on an appeal?

Inspector's powers on appeal

- Inspector has power to grant permission for the development enforced against or any "part" of it: s.177(1). This sits alongside his power to vary the enforcement notice: s.176.

- Ground (a) raises argument that permission should be granted for the matters alleged in the EN

- Ground (f) raises argument that the steps required exceed what is required to remedy either breach of control or harm to amenity.

Does the alternative scheme form “part of” the development enforced against?

Landmark Chambers

- In ***Ahmed v SSCLG*** [2014] EWCA Civ 566 CoA held that an Inspector had erred in failing to consider whether a smaller three storey scheme could be permitted where a four storey scheme was enforced against. The Appellant had put that argument in terms of ground (f) (which was not possible) but Inspector failed to consider an “obvious” alternative which was partial grant of permission.

- Availability of that route depends on “alternative” being “part of” what has been done. That’s a matter of planning judgment.

Limits of ground (f)

- If alternative goes beyond what has been enforced against, or does not form part of it, then it cannot be granted permission under ground (a)/s.177(1), or under ground (f): ***SSCLG v Ioannou*** [2015] 1 P&CR 10

- Further, ground (f) (on its own) can only be used to argue for survival of part of the development enforced against if the requirement which is said to be excessive is solely to remedy an injury to amenity: ***Miaris v SSCLG*** [2016] EWCA Civ 75.

- It follows limited bases for alternative schemes to be considered outside of ground (a) appeals.

3. Declining to consider further applications (s.70C)

Landmark Chambers

- If permission is granted can give rise to a fallback position, or a defence under s.180.
- LPA has a power to decline to consider in s.70C TCPA 1990:

"(1) A local planning authority may decline to determine an application for planning permission or permission in principle for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission or permission in principle, a "*pre-existing enforcement notice*" is an enforcement notice issued before the application was received by the local planning authority."

Relevant principles

- Underlying purpose is to prevent retrospective applications being used to delay enforcement action: ***Wingrove v Stratford-on-Avon*** [2015] EWHC 287 (Admin)

- Potentially engaged if any overlap between whole or any part of land covered by EN and application and will apply if the application seeks permission for any part of the matters specified in the EN – not limited to cases involving minor changes: ***R (Chesterton Commercial) v Wokingham BC*** [2018] EWHC 1795

- BUT should not be used to prevent consideration of new matters: so application for retention of a building for use different from that alleged in EN could not be declined: ***R(Banghard) v Bedford*** [2017] EHWC 2391

- NB interrelation with scope of what can be considered on the enforcement appeal.

Landmark Chambers

Legal issues in conditions and planning obligations

Joel Semakula

Overview of Topics

Landmark Chambers

- Interpreting Planning Conditions
- Conditions and New Permissions
- Obligations and New Permissions
- Amending Planning Obligations
- Unilateral Obligations to Fix Mistakes?
- Interpreting Planning Obligations

Interpreting Planning Conditions

Landmark Chambers

- Start with Supreme Court in *Trump* & *Lambeth*
- More recently: *UBB Waste Essex Ltd v Essex County Council* [2019] EWHC 1924 (Admin):

1) Permissions should be interpreted as by a **reasonable reader** with some knowledge of planning law and the matter in question
2) Common sense
3) Legitimate to consider the **planning "purpose" or intention** of the permission, where this is reflected in the reasons for the conditions and/or the documents incorporated
4) Where there are documents incorporated into the conditions by reference, **a holistic view** has to be taken, having regard to the relevant parts of those documents
5) Documents incorporated into the conditions → must be taken into account

   Where the documents sought to be relied upon are "extrinsic" → only if ambiguous
6) Court should be extremely **slow to consider the intention alleged to be behind the condition from documents which are not incorporated** and particularly if they are not in the public domain.

Conditions and New Permissions

Landmark Chambers

- *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government and others* [2019] UKSC 33
  - Supreme Court were faced with interpreting a planning permission granted under s.73 of the TCPA 1990.
  - In 1985: Lambeth had granted planning permission for a DIY store and garden centre with a condition that prevented the sale of food.
  - 2010: First s.73 application made --> no sale of food
  - 2014: Second s.73 permission granted --> no restriction on sale of food
- SC held: *"the conditions remain valid and binding because there was nothing in the new permission to affect their continued operation"*
- **Practice Point: Provides a greater scope for LPAs to argue that pre-existing conditions could continue to affect a relevant site.**

Obligations and New Permissions

Landmark Chambers

- Section 73 permissions will not be bound by section 106 Agreements unless expressly drafted: *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB) *per* Holgate J

- **Practice Point: Development undertaken pursuant to a s73 permission needs to be explicitly bound either by the original s106 agreement or by a new s106 agreement**

Amending Planning Obligations

- A planning obligation entered into after 25 October 1991 may be modified or discharged:
  - By agreement (at any time) between the appropriate authority and the person or persons against whom it is enforceable: section 106A(1)(a)
  - In accordance with TCPA 1990:
    - section 106A: Modifications and discharge of planning obligations
      - **Practice Point: Appropriate authorities cannot behave unreasonably in refusing requests made within the five year period: *R. (on the application of Batchelor Enterprises Limited) v North Dorset DC* [2004] J.P.L. 1222.**
      - **Practice Point: Application to modify an obligation was an "all or nothing" decision. If an LPA found some of the proposed modifications unacceptable, it may invite the application to submit a fresh or amended application but it must deal with the present application in its entirety: *R (Garden and Leisure Group Limited) v North Somerset Council* [2004] 1 P. & C.R. 39**
    - section 106B: Appeals in relation to applications under section 106A

Unilateral Obligations to Fix Mistakes?

Landmark Chambers

- *Ikram v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 2
  - Unilateral obligations issued subsequently do not correct errors introduced earlier in the decision-making process.
  - The Court of Appeal held that an undertaking to control the operation of a mosque in north London was an inadequate attempt to correct faulty conditions drafted by an inspector who had allowed the use on appeal.

- **Practice Point: Local authorities should act with caution before accepting unilateral obligations to correct errors introduced earlier in the decision-making process.**

Interpreting Planning Obligations

- *Aspire Luxury Homes (Eversley) Ltd v Hart DC* [2020] EWHC 3529 (QB) *per* Bourne J
  - It was not an abuse of process to bring an ordinary civil claim in relation to the construction of a s.106 agreement.
  - The validity of a s.106 agreement was highly likely to be a question of public law, suitable only for judicial review, whereas construing of a s.106 agreement was no different in principle from construing any contract.
  - There was no strong reason of principle why an issue over the meaning of a s.106 agreement should not be dealt with in the same way as an issue over the meaning of any other contract.
- **Practice Point: Risk that those seeking to avoid obligations consider this another potential line of attack.**

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers